SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,
Plaintiff-Petitioner,

v.

OHIO VALLEY INSURANCE COMPANY,
Defendant,

(BUCKEYE UNION INSURANCE COMPANY,
Intervening Defendant-Respondent),

(OHIO INSURANCE GUARANTY ASSOCIATION,
Intervening Defendant-Respondent),

(KEN BAILEY, ET. AL.,
Intervening Defendant-Petitioner).

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Memorandum of Intervening Defendant-Respondent, Ohio Insurance Guaranty Association

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Statement Of The Case

The Ohio Insurance Guaranty Association (the Guaranty Association) is a non-profit unincorporated association created by the Ohio Insurance Guaranty Association Act, Chapter 3955, Ohio Revised Code (the Act). Effective September 4, 1970, the Act in general directs the Guaranty Association to step into the shoes of an insolvent insurer in order to protect all of such insurer's policyholders and claimants from economic hardship as a result of the insolvency. Among other things, the Guaranty Association is responsible for assessing its membership which consists of all insurers transacting and licensed to transact any type of insurance in Ohio covered by the Act, and using the proceeds of such assessments to pay valid covered claims of insolvent insurers to Ohio claimants and to provide a defense for policyholders of insolvent insurers.

Pursuant to Section 3955.10(A)(1), the Superintendent of Insurance of Ohio is responsible for notifying the Guaranty Association of the existence of an insolvent insurer not later than three days after the Superintendent receives notice thereof. Upon notification by the Superintendent, the Guaranty Association is then deemed "the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." Section 3955.08(A)(2). On November 27, 1970, shortly after the Act became effective, and while the board of directors of the Guaranty Association was organizing and drafting a Plan of Operation, the Common Pleas Court of Franklin County, Ohio, decreed that Ohio Valley Insurance Company (Ohio Valley) was insolvent. Pursuant to the Act, the Superintendent of Insurance notified the Guaranty Association that Ohio Valley was an insolvent insurer.

On December 9, 1970, Buckeye Union Insurance Company, intervening defendant-respondent, filed its cross complaint for declaratory judgment in the Common Pleas Court, challenging the applicability of the Act to the insolvency of Ohio Valley. Because of the challenge the Guaranty Association intervened in the action, taking a neutral position, however, as to the merits of the issues raised. It sought to have the issues determined, nevertheless, as it did not want to collect assessments from its members or pay covered claims of several million dollars at risk of having its actions thereafter declared illegal and void, and further did not want to raise false hopes of claimants and policyholders.

At each level of appeal in this case the Guaranty Association has taken a neutral position and has simply asked the respective courts to give it direction so that it might carry out the valid legal purposes of the Act by which it was created. If the Guaranty Association had proceeded to collect assessments from its members and to pay all claims of Ohio Valley without regard to whether they arose prior to or after the effective date of the Act, September 4, 1970, it would have undertaken to pay approximately $3,300,000 in allowable claims, although only $500,000 of that total would have been referable to covered claims, as defined by the Supreme Court of Ohio, being those claims which arose subsequent to September 4, 1970. Consequently, if the Guaranty Association had not sought direction from the various courts as this case was appealed and had it proceeded to pay all claims, it would have illegally collected and paid to claimants $2,800,000. Other guaranty associations in the more than 40 other states with statutes nearly identical to the Act have been faced with a similar dilemma. In fact, in Florida the guaranty association assessed its members and paid claims of an insolvent insurer, only to have a lower state court sub-

sequently find that its guaranty association act violated the state constitution, although recently reversed by the Supreme Court of Florida.

The Ohio Guaranty Association desires to do all that is required of it by law, to undertake the burdens and provide the benefits as they relate to Ohio Valley and two other insurance companies doing business in Ohio which have become insolvent. As the state court proceedings have proven, however, the Guaranty Association can only effectively step into the shoes of insolvent insurers after resolution of the constitutional issues which have been raised. For this reason the Guaranty Association supports the petition for writ of certiorari filed by the Superintendent of Insurance, hoping that the Supreme Court of the United States will, by taking the case and resolving the issues, provide the Guaranty Association with appropriate direction or eliminate it entirely by declaring the Act unconstitutional.

Reasons Relied On For Allowance Of The Writ

The Superintendent of Insurance of Ohio in his Petition for Writ of Certiorari relies upon Supreme Court of the United States Rule 19.1(a). Much of the petition of the Superintendent is devoted to whether the Supreme Court of Ohio "has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Those issues have been adequately briefed by the Superintendent of Insurance, and the Guaranty Association merely intends in this brief to state why it believes that "there are special and important reasons" for this Court to review on writ of certiorari the decision of the Supreme Court of Ohio in this case.

The Supreme Court of Ohio has concluded in this case that as a matter of statutory interpretation all claims

against an insolvent insurer which arose prior to September 4, 1970 are not "covered claims" as defined in Chapter 3955, Ohio Revised Code. The Guaranty Association supports the petition for writ of certiorari filed by the Superintendent of Insurance. The questions raised in that petition concerning the constitutionality of the Act as interpreted by the Supreme Court of Ohio, and specifically the issue of whether the Act violates the equal protection provisions of the Fourteenth Amendment of the Constitution of the United States, will be unresolved and may be the subject of further litigation both in Ohio and in numerous other jurisdictions unless this Court rules on the merits of the issues raised in the petition.

This Court has frequently stated that "the denial of a writ of certiorari imports no expression of opinion upon the merits of a case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1922). *See Brown v. Allen*, 344 U.S. 443, 491-2 (1952); and *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959). Consequently, a denial of a writ of certiorari in this case would be of no value as precedent if these identical issues are raised in other proceedings in Ohio or other states. Furthermore, because of the manner in which the issues of the constitutionality of the Act arose, initially on a motion for rehearing and reconsideration before the Supreme Court of Ohio, there is a serious question as to whether the issues have been decided as they relate to the application of the Act to the insolvency of Ohio Valley.

If this Court denies certiorari in this case, the question will remain as to whether the Supreme Court of Ohio has decided or disregarded the constitutional issues raised in the petition for writ of certiorari filed by the Superintendent of Insurance. The Supreme Court of Ohio denied the motion for rehearing and reconsideration without a written decision. The Guaranty Association agrees with

the position of the Superintendent of Insurance that, since the issues were raised before the Supreme Court of Ohio in the motion for rehearing and reconsideration, the Supreme Court of Ohio ruled on the merits of the issues when it overruled the motion. Nevertheless, refusal by this Court to consider the issues will leave open the serious question as to whether the Supreme Court of Ohio has ruled that application of the Act to the insolvency of Ohio Valley does not violate the equal protection provisions of the Fourteenth Amendment of the Constitution of the United States.

Presently, there are many disappointed claimants and policyholders of Ohio Valley with respect to claims which arose prior to September 4, 1970. As pointed out in the petition of the Superintendent of Insurance, the liquidator has estimated that there are $3,300,000 in allowable claims of Ohio Valley, but only $500,000 in claims arising subsequent to September 4, 1970. Unless this Court grants the writ of certiorari sought by the Superintendent of Insurance any one of these disappointed claimants or policyholders could raise the very constitutional issues set forth in the Superintendent's petition in further state or federal court proceedings. Such proceedings could result in delays of years before a final non-appealable decision has been rendered. The Guaranty Association has sought to carry out the responsibilities imposed upon it by the Act; but since December, 1970 the Association has been unable to function as it was intended to function because of this litigation. To prevent further delay in making clear the obligation of the Guaranty Association and the rights of claimants and policyholders of Ohio Valley, the Guaranty Association respectfully urges this Court to rule on the merits of the issues raised by the Superintendent's petition.

In addition to the Ohio Valley insolvency, the Guaranty Association has been advised by the Superintendent of

Insurance that Maine Insurance Company (and on January 6, 1972, that LaSalle National Insurance Company) is an insolvent insurer as defined by the Act. The ancillary receivership of that company is pending in Ohio in the case of *Kenneth DeShetler, Superintendent of Insurance of Ohio, Plaintiff, v. Maine Insurance Company, Defendant,* Case No. 244,358, in the Common Pleas Court of Franklin County, Ohio. Claimants and policyholders of Maine Insurance Company are directly affected by the decision of the Supreme Court of Ohio interpreting application of the Act to Ohio Valley, and will be affected by the decision of this Court on the petition for writ of certiorari. If this Court does not grant certiorari, the issue presented in the Superintendent's petition that the Act violates the equal protection provisions of the Fourteenth Amendment of the Constitution will be undecided as it relates to the insolvency of Maine Insurance Company and of any other insurance companies which become insolvent insurers in the future.

Further litigation in the Maine Insurance Company case and potential future insolvencies will create tremendous delays in the administration of justice under the Act. Thousands of court cases may be delayed unnecessarily at a time when judges and court administrators urge speeding up both civil and criminal dockets. For approximately one year all cases in which Ohio Valley is a party or in which it provides or is obligated to provide a defense have been stayed throughout Ohio by injunction pending final resolution of the issues in this case. A similar stay of all proceedings has been in effect for Maine Insurance Company for approximately six months. These stays have been necessary because if the Guaranty Association has no authority under the Act to provide a defense for policyholders of insolvent insurers, those policyholders must provide their own defense in each case. Many, if

not most, of the casualty companies in the United States which are now insolvent, including Ohio Valley, wrote high risk automobile insurance, and most policyholders of such companies have low incomes and can ill afford to defend themselves in court, let alone pay judgments which might be obtained by default while the courts are determining the meaning and constitutionality of the Act.

Presumably similar delays in the judicial process are occurring throughout the 40 states which have guaranty association acts similar to ours in Ohio. Until such time as the issues presented to this Court in the petition for writ of certiorari are finally decided, the intended purposes of the various guaranty association acts to protect claimants and policyholders and prevent delay in the payment of claims when an insurer becomes insolvent will continue to be frustrated, or guaranty associations will continue to hold out false hope to claimants and policyholders when in fact such associations can have no standing because they are creatures of unconstitutional statutes.

As pointed out in the petition of the Superintendent of Insurance the decision of the Supreme Court of Ohio is having and will continue to have a substantial impact in a number of jurisdictions other than Ohio, and similarly the decision of whether to grant the writ of certiorari sought in this case will also have substantial repercussions in the more than 40 states other than Ohio which have language in their respective guaranty association acts nearly identical to that of the Ohio Act. Ohio is the first state in which the courts have interpreted the application of the Act to a particular insolvency. However, the various guaranty association acts already have brought forth substantial litigation raising a number of common law and constitutional issues.

There is litigation pending in Florida, Louisiana and Arizona seeking resolution of issues which are in part

identical to those issues raised in the Ohio Valley case and this petition for writ of certiorari. By granting certiorari this Court can alleviate the confusion and turmoil throughout the more than 40 states with guaranty association acts similar to that in Ohio and can provide direction to the respective guaranty associations which must deal with existing insolvent insurers and their claimants and policyholders. Guaranty associations are being forced to forestall action because of the various lawsuits throughout the country questioning their legality. Even the guaranty associations in those states where no litigation is pending are looking carefully to the states where litigation is pending and particularly to this Court to determine what course of action should be followed with respect to the particular insurance company insolvencies in which they are currently involved.

Policyholders and claimants of insolvent insurance companies should be promptly protected. The Guaranty Association and presumably all other guaranty associations throughout the respective states are anxious to carry out the responsibilities legally and constitutionally placed upon them by the various guaranty association acts. The Guaranty Association asks that this Court consider and resolve the issues presented in the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, Arthur I. Vorys, attorney for respondent, Ohio Insurance Guaranty Association, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the day of January, 1972, I served by mailing, in duly addressed envelopes, with first class postage prepaid, three printed copies of the foregoing Memorandum for Ohio Insurance Guaranty Association, on William M. Lane, special counsel for William J. Brown, Attorney General of Ohio, attorneys for petitioner, Superintendent of Insurance of Ohio; Stewart & DeChant Co., L.P.A., Thomas H. DeChant, 1014 Hippodrome Building, Cleveland, Ohio 44114, attorneys for petitioners, Ken Bailey, et al.; Caren, Lane, Huggard, Alton & Horst, Loren W. Peters, 150 East Broad Street, Columbus, Ohio 43215, of counsel; William L. Schmidt, J. Roth Crabbe, and William H. Allyn, Jr., Crabbe, Newlon, Potts, Schmidt, Brown & Jones, 42 East Gay Street, Columbus, Ohio 43215, attorneys for respondent, Buckeye Union Insurance Company, being all parties required to be served.

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